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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 100

BERTRAM WILLIAMS, MAX BRASCH AND HEINZ MOTTEK, SUING ON BEHALF OF THEMSELVES AND ALL OTHER HOLDERS OF CLASS B DEBENTURES OF GREEN BAY AND WESTERN RAILROAD COMPANY, PETITIONERS,

vs.

GREEN BAY AND WESTERN RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 31, 1945.

CERTIORARI GRANTED OCTOBER 8, 1945.

SUPREME COURT OF THE UNITED STATES

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 17, 1945.

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, Suing on Behalf of Themselves and All Other Holders of Class B Debentures of Green Bay and Western Railroad Company, Plaintiffs-Appellants,

against

GREEN BAY AND WESTERN RAILROAD COMPANY, Defendant-Appellee

(Civil Action No. 26-194)

STATEMENT PURSUANT TO RULE 13

This is an action brought by plaintiffs as holders of Class B debentures issued by defendant, Green Bay and Western Railroad Company, on behalf of themselves and all other holders of such debentures, to recover amounts payable under such debentures out of earnings in lieu of interest.

The action was instituted in the New York Supreme Court, New York County, on April 26, 1944, by service of a copy of the summons and complaint on the defendant in the City of New York. On petition of defendant alleging diversity of citizenship and that the amount in controversy exceeds $3,000, the action was removed to the United States District Court for the Southern District of New York on [fol. 2] June 15, 1944. The defendant appeared specially and moved, by notice of motion dated and served June 19th, 1944, to dismiss the complaint for lack of jurisdiction over the person on the ground that the defendant, a Wisconsin corporation, was not doing business within the State of New York. By stipulation dated July 18, 1944, the defendant amended its notice of motion to include a motion to dismiss the complaint for lack of jurisdiction of the subject matter of the action on the ground that the subject matter was concerned with the internal affairs of a foreign corporation.

The said motions came on regularly to be heard at a term of the United States District Court for the Southern District of New York, held on July 18, 1944, before Judge Francis G. Caffey.

In an opinion dated August 1, 1944, Judge Caffey held that the defendant was doing business within the State of New York and accordingly denied the motion to dismiss the complaint on the ground of lack of jurisdiction over the person. The motion to dismiss the complaint on the ground that the court lacked jurisdiction of the subject matter of the action in that it was concerned with the internal affairs of a foreign corporation was granted.

On August 9, 1944, an order and judgment was entered dismissing the complaint.

On September 1, 1944, the notice of appeal was filed with the Clerk of the United States District Court for the Southern District of New York.

The names of the parties are as set forth above, no changes having taken place.

There has been no arrest, bail or attachment, and no question was ever referred to a commissioner or commissioners, master or referee.

[fol. 3] IN SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, Suing on Behalf of Themselves and All Other Holders of Class B Debentures of Green Bay and Western Railroad Company, Plaintiffs,

against

GREEN BAY AND WESTERN RAILROAD COMPANY, Defendant

COMPLAINT

Plaintiffs bring this action on behalf of themselves and of all other holders of Class B Debentures of defendant Green Bay and Western Railroad Company who may elect to join in the prosecution of this action and contribute to the expense thereof, and allege:

1. The question which is the subject of this action is one of common and general interest to all holders of Class B Debentures of the defendant, Green Bay and Western Railroad Company.

2. Plaintiff Bertram Williams is the owner and holder of $20,000 face amount of Class B Debentures of the defendant, consisting of 20 certificates of the face value of

$1,000 each and bearing serial numbers 84, 546, 598, 612, 613, 621, 643, 1253, 1266, 2320, 2570, 2733, 2816, 3661, 4798, 4889, 4934, 5042, 5863 and 6392, respectively.

3. Plaintiff Max Brasch is the owner and holder of $30,000 face amount of Class B Debentures of the defendant, consisting of 30 certificates of the face value of $1,000 each and bearing serial numbers 45, 133, 154, 673, 777, 901, 998, [fol. 4] 1677, 1702, 1801, 1802, 1803, 1804, 1856, 1992, 2087, 2383, 2384, 2628, 2629, 2630, 2963, 3359, 3362, 3364, 4369, 5892, 5923, 6713 and 6919, respectively.

4. Plaintiff Heinz Mottek is the owner and holder of $24,000 face amount of Class B Debentures of the defendant, consisting of 24 certificates of the face value of $1,000 each and bearing serial numbers 1069, 1094, 1095, 1096, 1097, 1100, 1103, 1104, 1106, 1107, 2080, 2208, 2224, 5108, 6010, 6041, 6441, 6694, 6718, 6720, 6730, 6735, 6800 and 6875, respectively.

5. Defendant is a foreign corporation organized and existing under the laws of the State of Wisconsin, and maintains an office for the transaction of business within the City and State of New York.

6. The Articles of Incorporation of the defendant authorized it to issue Class B Debentures in the face amount of $7,000,000, pursuant to the following provision thereof:

> "Seven Million Dollars face value of instruments to be issued by said new company to be known as Class B Debentures, which debentures shall be issued in amounts of One Thousand Dollars each and shall be payable only in the event of a sale or reorganization of the railroad and property of said company and then only out of any net proceeds of such sale or reorganization which may remain after payment of all liens and charges upon said railroad or property, and after payment of Six hundred Thousand Dollars to the holders of said Class A Debentures and Two million five hundred Thousand Dollars to the stockholders, any such net proceeds remaining after such payments to be distributed pro rata to and among the holders of the said Class B Debentures, the holders thereof to be entitled to receive in lieu of interest thereon any net earnings of the railroad and property in each year re-

maining after payment of five per cent upon the said Class A Debentures and the said stock. Such surplus [fol. 5] net earnings, if any, to be paid to and distributed among the holders of Class B Debentures pro rata and the said debentures to contain such further provisions as may be agreed upon between the Company and the said purchasers."

7. Pursuant to said provision of its said Articles of Incorporation, the defendant issued under its corporate seal as of July 1, 1896 seven thousand of its Class B Debentures in the face amount of $1,000 each, said debentures being in the form annexed hereto as Exhibit "A".

8. In addition to the Class B Debentures, the defendant was authorized by its Articles of Incorporation to issue and did issue capital stock of an aggregate par value of $2,500,000, and Class A Debentures in the face amount of $600,000.

9. In and by its Articles of Incorporation and the debentures issued thereunder, the defendant contracted and agreed to pay to and distribute pro rata among the holders of its Class B Debentures, in lieu of interest, any net earnings of the defendant remaining in each year after payment of 5% on the par value of its capital stock and 5% on the face value of its Class A Debentures. The amount required annually for such preferential payments to the holders of defendant's capital stock and Class A Debentures aggregated $155,000.

10. In each of the years commencing with 1924 to and including 1943, with the exception of the years 1932, 1933 and 1934, the defendant had substantial net earnings in excess of the $155,000 required to be paid to the holders of its capital stock and Class A Debentures. The aggregate amount of such net earnings, after deducting reserves for additions, general improvements and depreciation, and after deducting said sum of $155,000 in each of said years, was $1,649,618.85. The amount of such net earnings of defendant in each of said years, the amount distributed in each of said years to the holders of defendant's capital stock and Class A Debentures, and the amount of net earn- [fol. 6] ings remaining in each of said years for distribution to the holders of Class B Debentures is shown in Exhibit "B" annexed hereto.

11. The defendant paid to the holders of its Class B Debentures from its net earnings for the years 1924 to 1943, with the exception of the years 1932, 1933 and 1934, sums aggregating $840,000. Exhibit "C" annexed hereto shows the amounts paid to the holders of Class B Debentures in each of said years.

12. The defendant failed and neglected to pay to or distribute among the holders of Class B Debentures its remaining net earnings in the aggregate sum of $809,618.85, and instead and contrary to its agreement with the holders of its Class B Debentures retained said earnings and carried the same to and accumulated them in its surplus account. The amount of such earnings so improperly retained and carried to and accumulated in its surplus account for each of the years 1924 to 1943, with the exception of the years 1932, 1933, and 1934, is shown on Exhibit "C" hereto annexed under the heading "Net Earnings Withheld".

13. The surplus of the defendant in each of the years aforementioned was in excess of the defendant's annual net earnings, and the payment of said annual net earnings to the holders of the Class B Debentures would not at any time have created a deficit.

14. Said sum of $809,618.85 is now carried by the defendant in its surplus account and represents the amount from net earnings of the defendant which the holders of the Class B Debentures are entitled to receive in lieu of interest under their contract with the defendant. Said sum is justly due and owing to the said holders and should be distributed among said holders pro rata.

15. Defendant has failed to pay any part of said sum and has taken no action looking towards the payment thereof to the holders of its Class B Debentures, but on the contrary [fol. 7] continues to carry said sum in its surplus account and wrongfully withholds the same from the holders of its Class B Debentures, and there is danger that said sum now credited to the surplus account of defendant may be appropriated to other purposes and uses of the corporation and thereby dissipated and made unavailable for payment of the sums due and owing by the defendant on its Class B Debentures.

16. That the plaintiffs have no adequate remedy at law.

Wherefore, plaintiffs demand judgment:

(1) That the rights of plaintiffs and of all other holders of Class B Debentures in and to the net earnings of the defendant be determined;

(2) That this Court decree that the holders of Class B Debentures of defendant are entitled to receive pro rata the sum of $809,618.85, with appropriate interest, as their share of the annual net earnings of defendant for the years 1924 to 1943, inclusive, in lieu of interest on said debentures;

(3) That this Court direct the defendant to pay and distribute such sum among the holders of its Class B Debentures pro rata;

(4) That the plaintiffs be awarded out of any recovery herein the expenses, costs and disbursements incident to the prosecution of this action, including reasonable counsel and accounting fees to their attorneys and accountants herein;

(5) And that the plaintiffs have such other and further relief as may be just and proper.

Unger & Pollack, Attorneys for Plaintiffs, Office & P. O. Address, 111 Broadway, Borough of Manhattan, New York, N. Y.

(Verified by all three plaintiffs.)

[fol. 8] EXHIBIT "A"

(Attached to Complaint)

UNITED STATES OF AMERICA

GREEN BAY AND WESTERN RAILROAD COMPANY

STATE OF WISCONSIN

$1,000 Class B. Debenture No. —

The Green Bay & Western Railroad Company hereby certifies that this is one of a series of Seven thousand of its Class B Debentures in the sum of One Thousand Dollars each, aggregating in all the sum of Seven Million Dollars, which sum of One Thousand Dollars will be payable to the bearer hereof, or if registered, to the person appearing on the books of the said Company as the last registered owner

hereof, only in the event of a sale or reorganization of the Railroad and property of said Company, and then only out of any net proceeds of such sale or reorganization which may remain after payment of any liens and charges upon such railroad or property, and after payment of Six hundred thousand Dollars to the holders of a series of debentures known as Class A, issued or to be issued by said Company, and the sum of Two Million, five hundred thousand Dollars to and among the stockholders of said Company. Any such net proceeds remaining after such payments shall be distributed pro rata to and among the holders of this series of Class B Debentures. The said Railroad Company Hereby Covenants and Agrees that no mortgage shall at any time be placed upon its railroad and other property, nor shall the same be leased or sold without the consent of the holders of seventy five per cent of the capital stock outstanding at the time of such mortgage lease or sale. The said Railroad Company Hereby Agrees that until such payment, the holders of this Series of Debentures shall in lieu of interest thereon participate in the distribution of annual net income to the following extent, viz.:— So much of the annual net earnings of [fol. 9] the said Company in any year as would be applicable to the payment of dividends on stock shall be applied as follows, viz.:— To the holders of Class A Debentures 2½ per cent upon the face value thereof, or if such annual net earnings are insufficient for the payment of the same, then all such net earnings shall be distributed pro rata among the holders of said Class A Debentures. After the payment of 2½ per cent upon the face value of Class A Debentures, the stockholders of the Company are entitled to receive the balance of such net earnings until 2½ per cent shall have been paid out of the same upon the par value of the said stock, and all surplus net earnings then remaining shall be paid to the holders of Class A Debentures and of the stock pro rata until five per cent shall have been paid upon the face value of said Debentures and upon the par of said stock for such year, and any surplus net earnings arising in such year which may then remain shall be paid to and distributed among the holders of Class B Debentures pro rata. None of such payments shall be cumulative. The amounts, if any, payable upon this series of debentures out of the net earnings in any year, will be fixed and declared by the Board of Directors on or before the first day of February, in the following year, and when

so declared, any amount payable hereon will be paid at the office or agency of the Company in the City of New York on or before the first day of March, in such year to the holder of this debenture, upon its production at such office or agency in order that such payment may be stamped hereon; or, if registered, payment will be made by check mailed to the person appearing on the books of this company as the registered owner hereof at the last address furnished by him to this company. This debenture shall pass by delivery unless registered on the books of the Company at its office or agency in the City of New York, and when so registered, and registry noted hereon, title thereto shall pass only by assignment executed by the last registered owner and noted on such register. This instrument shall not be [fol. 10] valid for any purpose unless authenticated by the signature of the Farmers' Loan and Trust Company to the certificate endorsed hereon.

In Witness Whereof the said Green Bay and Western Railroad Company has caused these presents to be duly executed under its corporate seal at the City of Green Bay this 1st day of July 1896.

Green Bay and Western Railroad Company, by S. S. Palmer, President.

Attest:

Mark T. Cox, Secretary.

The Farmers Loan and Trust Company hereby certifies that this is one of a series of Seven thousand of Class B Debentures of $1,000 each issued by the Green Bay & Western Railroad Company as therein set forth.

The Farmers Loan and Trust Company, by Wm. H. Leupp, Vice-President.

[fol. 11] EXHIBIT "B"

(Attached to Complaint)

Year	Net Earnings (after deducting reserves for additions, general improvement and depreciation)	Paid on Capital Stock	Paid on Class A Debentures	Net Earnings Payable on Class B Debentures
1924	$ 197,883.57	$ 125,000.00	$ 30,000.00	$ 42,883.57
1925	194,964.16	125,000.00	30,000.00	39,964.16
1926	192,795.67	125,000.00	30,000.00	37,795.67
1927	219,592.97	125,000.00	30,000.00	64,592.97
1928	229,278.75	125,000.00	30,000.00	74,278.75
1929	235,211.65	125,000.00	30,000.00	80,211.65

1930	245,491.57	125,000.00	30,000.00	90,491.57
1931	180,482.28	125,000.00	30,000.00	25,482.28
1935	171,161.66	125,000.00	30,000.00	16,161.66
1936	242,763.66	125,000.00	30,000.00	87,763.66
1937	308,110.51	125,000.00	30,000.00	153,110.51
1938	173,017.64	125,000.00	30,000.00	18,017.64
1939	243,505.48	125,000.00	30,000.00	88,505.48
1940	253,497.69	125,000.00	30,000.00	98,497.69
1941	301,165.54	125,000.00	30,000.00	146,165.54
1942	304,250.05	125,000.00	30,000.00	149,250.05
1943	591,446.00	125,000.00	30,000.00	436,446.00
Totals	$4,284,618.85	$2,125,000.00	$510,000.00	$1,649,618.85

[fol. 12]

EXHIBIT "C"

(Attached to Complaint)

Year	Net Earnings Payable on Class B Debentures	Amounts Actually Paid on Class B Debentures	Net Earnings Withheld
1924	$ 42,883.57	$ 35,000.00	$ 7,883.57
1925	39,964.16	35,000.00	4,964.16
1926	37,795.67	35,000.00	2,795.67
1927	64,592.97	35,000.00	29,592.97
1928	74,278.75	70,000.00	4,278.75
1929	80,211.65	70,000.00	10,211.65
1930	90,491.57	70,000.00	20,491.57
1931	25,482.28		25,482.28
1935	16,161.66		16,161.66
1936	87,763.66	70,000.00	17,763.66
1937	153,110.51	105,000.00	48,110.51
1938	18,017.64		18,017.64
1939	88,505.48	35,000.00	53,505.48
1940	98,497.69	35,000.00	63,497.69
1941	146,165.54	70,000.00	76,165.54
1942	149,250.05	70,000.00	79,250.05
1943	436,446.00	105,000.00	331,446.00
Totals	$1,649,618.85	$840,000.00	$809,618.85

[fol. 13] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, Suing on Behalf of Themselves and All Other Holders of Class B Debentures of Green Bay and Western Railroad Company, Plaintiffs,

against

GREEN BAY AND WESTERN RAILROAD COMPANY, Defendant

(Civil Action No. 26-194)

NOTICE OF MOTION TO DISMISS FOR LACK OF JURISDICTION OVER PERSON

SIRS:

Please take notice that upon the annexed affidavit of Richard B. Wilson, sworn to the 17th day of June, 1944, and the affidavit of John A. Moore, sworn to the 16th day of June, 1944, the undersigned, appearing specially as attorneys for the defendant, Green Bay and Western Railroad Company, for that purpose alone, will move this Court at a motion term to be held in the United States Court House, Foley Square, Borough of Manhattan, City of New York, State of New York, on the 30th day of June, 1944, at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order setting aside the service of the summons and complaint herein and dismissing the said complaint on the ground that the defendant, a railroad corporation organized and existing by virtue of the laws of the State of Wisconsin, is not doing business within the State of New York and, accordingly, that the Court lacks jurisdiction over the person of the defendant herein, and for such other and further relief as may be just and proper.

[fol. 14] Please take further notice that you are hereby required to serve any and all affidavits to be used in answering this motion on the undersigned at least five (5) days before the hearing of this motion.

Dated, New York, N. Y., June 19, 1944.

Yours, etc., Cadwalader, Wickersham & Taft, by Merrill M. Manning, Partner, Attorneys for Defendant, appearing specially, Office and Post Office Address: No. 14 Wall Street, Borough of Manhattan, City of New York.

To Messrs. Unger & Pollack, Attorneys for Plaintiffs, 111 Broadway, Borough of Manhattan, New York, N. Y.

[fol. 15] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF RICHARD B. WILSON, READ IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

[Same Title]

SOUTHERN DISTRICT OF NEW YORK,
State of New York,
County of New York, ss:

RICHARD B. WILSON, being duly sworn, deposes and says, as follows:

1. He resides in the State of New York and his principal occupation is that of General Partner in the firm of Robert Winthrop & Co., Stock and Bond Brokers, with membership on the New York Stock Exchange and offices at No. 20 Exchange Place, New York, N. Y. He is also a Director and Assistant Secretary and Assistant Treasurer of Green Bay and Western Railroad Company, the defendant in the above entitled action. He makes this affidavit in support of a motion by the defendant to set aside the service of the summons and complaint herein and to dismiss for lack of jurisdiction by the Court over the person of the defendant.

2. This action was attempted to be commenced in the Supreme Court, New York County, by service of the summons and complaint on deponent as Assistant Secretary and Assistant Treasurer of the defendant, such service being made on April 26, 1944, at the office of Robert Winthrop & Co., 20 Exchange Place, New York, N. Y.

3. On May 16, 1944, the action was duly removed to this Court by the filing with the Supreme Court of the State of New York, County of New York, of a petition for removal and the required surety bond and by the filing in this Court on June 15, 1944 of a duly certified copy of the transcript of record of the action in the Supreme Court of the State of New York, County of New York. Notice of the filing of said transcript of record was duly served on the attorneys [fol. 16] for the defendant on June 15, 1944. Defendant's time to plead is to and including June 20, 1944 and has not yet expired.

4. The gravamen of the single cause of action alleged in the complaint is to cause such a construction of the provi-

sions of the certificate of incorporation and the Class B Debentures of the defendant in such a fashion that would require the defendant railroad corporation, without exercise of discretion by the directors, to pay out to holders of Class B Debentures all of its surplus earnings for each year since 1924, after making fixed payments limited to 5% and no more on the face amount of Class A Debentures and par amount of Common Stock, the Class A Debentures and Common Stock being senior securities to the Class B Debentures.

5. The defendant appears specially herein for the sole purpose of moving to set aside the service of the summons and complaint herein upon the grounds that at the time of the attempted commencement of said action the defendant was a foreign corporation, organized and existing under and by virtue of the laws of the State of Wisconsin, and was not doing business within the State of New York, that the Court has no jurisdiction over the person of the defendant.

6. The defendant is a foreign corporation, organized and existing under and by virtue of the laws of the State of Wisconsin and all of its railroad lines, stations and other physical properties are situated in the State of Wisconsin. Defendant has never filed a certificate in the State of New York to authorize it to do business nor has it designated a person within the State of New York upon whom process may be served, nor does it pay taxes to the State of New York. Its principal and general offices are situated in Green Bay, Wisconsin, where its president and all of its operating officers reside and have their offices, from which the operations of the railroad are conducted. These executive and operating officers are as follows:

[fol. 17] President—Homer E. McGee; Purchasing Agent and Assistant Treasurer—J. M. Zahorik; General Auditor—Louis P. Wohlfeil; Chief Engineer—F. S. Halliday.

The cash books of the Company are kept at the Green Bay office, showing daily receipts, collection of accounts due, operating records, pay roll records, statements of claims, etc. No books of the Company concerning its railroad business are kept at any other office. The defendant maintains a bank account in Green Bay, Wisconsin, where the receipts from the operation of the railroad are deposited and where checks for operating expenses are drawn and signed.

7. Charles W. Cox, a General Partner of the said stock exchange firm of Robert Winthrop & Co., is a Director of the defendant railroad corporation and is also Secretary and Treasurer. He resides in the State of New Jersey and practically all of the time which he devotes to business affairs is spent in the pursuit of his duty as a partner of Robert Winthrop & Co. at the New York offices of that firm. He receives a salary aggregating $2,000 per year from the railroad corporation, which amount is paid by checks signed in Green Bay, Wisconsin, and mailed to him from that office. This salary of $2,000 is in essence a payment for services in connection with the supervising of transfers of the railroad corporation's stock, payment of dividends, and payment of income distributions to holders of Class A and Class B Debentures, etc., which activities are referred to in more detail in paragraph "9" hereof. As Secretary and Treasurer he performs no duties in connection with the operation of the railroad.

8. Deponent is, as hereinabove stated, a General Partner of Robert Winthrop & Co. and is also a Director and Assistant Secretary and Assistant Treasurer of the de- [fol. 18] fendant. His duties as such officer are confined practically solely to the supervision of stock transfers and other details relating to distributions on the various outstanding securities of the defendant and related questions. He receives no salary from the defendant.

9. The capitalization of the defendant railroad corporation consists of $600,000 face amount of Class A Income Debentures, $2,500,000 par amount of Common Stock, and $7,000,000 face amount of Class B Debentures. All of these securities are listed on the New York Stock Exchange and transfer and payment offices in New York City are required under the rules of the New York Stock Exchange. Instead of employing an outside bank or trust company to act as transfer agent and paying agent, these details are conducted at the office of Robert Winthrop & Co. at 20 Exchange Place, under the direction of Mr. C. W. Cox, Secretary and Treasurer, and deponent as Assistant Secretary and Assistant Treasurer. The clerical staff of Robert Winthrop & Co. is utilized to the extent necessary for these purposes and that firm is paid approximately at the rate of $2,000 per year for such services; also, as hereinbefore stated, $2,000 is paid to Mr. Cox. Deponent is informed and believes that the sum

of $4,000 is a fair and reasonable charge for the services as so performed by Mr. Cox and his firm and that it would cost at least that sum and probably more if an outside bank or trust company was called upon to perform them. The office of Robert Winthrop & Co., at 20 Exchange Place, New York, N. Y., is an agency office for payment of distributions declared and payable on Class A and Class B Debentures of the defendant and for the transfer of such securities and of the stock of the defendant. In no other sense is it an office of the said railroad corporation. The railroad corporation's name does not appear upon the Bulletin Board of the Building, nor upon any of the doors of the offices occupied by Robert Winthrop & Co. In connection with sending out distribution checks and returning bearer Debentures to their [fol. 19] respective owners, after presentation for notation of interest payments, a letterhead of the railroad corporation is used with the address shown as 20 Exchange Place, New York, N. Y. (which, as hereinabove stated, is the office of Robert Winthrop & Co.).

10. A bank account is maintained in New York mainly in connection with prospective payments of distributions o securities of the defendant corporation, although at irregular times when there appeared to be an excess of operating funds in the Green Bay banks, a portion of such funds have been temporarily transferred to a bank account in New York.

11. Over a period of years the defendant railroad corporation has maintained a traffic office in New York City, the present address of which is 350 Madison Avenue, in charge of John A. Moore. Mr. Moore's duties are confined solely to the solicitation of freight business over the lines of the defendant railroad after it has been carried by an initial carrier which receives the shipment in the State of New York, or other point of origin. The bills of lading and all contracts in relation thereto are made by the shipper direct with the initial carrier and Mr. Moore has nothing to do whatsoever with consummating the shipping arrangements nor does he have any authority to make collections, settling claims, or entering into contracts on behalf of the defendant. The office force consists of the agent, Mr. Moore, and his secretary. The lease for the space was signed by the President of the defendant in Green Bay, Wisconsin, and checks for the rental and for payment of salaries and expenses of

the traffic office are forwarded to New York from Green Bay. No passenger tickets are sold at this office or any other place within the state. An affidavit of Mr. Moore is annexed hereto.

12. Solely for the convenience of Directors, it has been customary to hold directors' meetings in New York City at the office of Robert Winthrop & Co. Two of the Directors [fol. 20] are residents of New Jersey and two are residents of New York City. In the calendar year 1943, four such meetings were held. Stockholders' meetings are held in Green Bay, Wisconsin, as required by statute.

13. As hereinbefore stated, the capitalization of the defendant railroad corporation consists of $600,000 face amount of Class A Income Debentures, $2,500,000 par amount of Common Stock, and $7,000,000 face amount of Class B Debentures. The Class A Debentures and the Common Stock are securities senior to the Class B Debentures and are entitled to receive maximum income distributions of 5% of their face or par amount in any year before Class B Debentures receive any payment. The Class B Income Debentures are therefore the junior equity securities. These securities were originally issued pursuant to a plan of reorganization of the Railroad in the year 1896 and have been outstanding since that time.

14. The defendant has fully stated the facts in this case to one of its counsel, Merrill M. Manning, a member of the firm of Cadwalader, Wickersham & Taft, 14 Wall Street, New York, N. Y., and the defendant has been advised by said firm that it has good and substantial defenses on the merits to the cause of action alleged in the complaint.

Wherefore, deponent prays that this Court issue an order setting aside the service of the complaint and dismissing the complaint for lack of jurisdiction over the person of the defendant and for such other and further relief as may be just.

Richard B. Wilson.

(Sworn to the 17th day of June, 1944.)

[fol. 21] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JOHN A. MOORE, READ IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

STATE OF NEW YORK,
County of New York, ss:

JOHN A. MOORE, being duly sworn, deposes and says:

I am employed by the defendant, Green Bay and Western Railroad Company, as an Assistant General Freight Agent and have been so employed for a number of years. At one time my title was that of General Eastern Agent. In recent years, the title was changed to my present title so that I could continue in the employ of the company and meet the requirements of the Railway Retirement Act. My duties under both of the said titles have been and are the same. I have my office, which bears Room No. 713, in the building at 350 Madison Avenue, Borough of Manhattan, City of New York. The only occupants of that office are myself and a clerk. The office is about twenty feet square and contains three desks and about a half dozen chairs, two steel filing cabinets for correspondence, and some stationery.

The Official Guide of Railways, issued by the National Railway Publishing Company of 424 West 33rd Street, New York City, and used extensively in the railroad world, at page 229, sets forth in substance as follows:

"GREEN BAY AND WESTERN RAILROAD COMPANY
KEWAUNEE, GREEN BAY AND WESTERN RAILROAD COMPANY

THE ANNAPEE AND WESTERN RAILWAY COMPANY

General Offices—Green Bay, Wisconsin

Executive

Homer E. McGee, President — Green Bay, Wisconsin

[fol. 22]

Operating

F. S. Halliday, Chief Eng. and Engr. Maintenance of Way — " " "
T. M. Kirkby, Chief Mechanical Officer — " " "

E. V. Johnson, Gen. Supt. Transp. " " "
A. H. Schaeffer, Asst. to President " " "
J. C. Hill, Supt. Track Maintenance " " "
G. O. Eiler, Freight Claim Agent " " "

Traffic

L. C. Jorgensen, Traffic Mgr. " " "
G. H. Chapman, Genl. Freight Agent " " "

Accounting, Treasury and Purchasing

L. P. Wohlfeil, Gen. Auditor and Asst. Treasurer " " "
L. F. Bridenhagen, Asst. Genl. Aud. and Car Accountant " " "
Chas. W. Cox, Secy. and Treas. 20 Exchange Pl. New York City
J. M. Zahorik, Purchasing Agent Green Bay, Wisconsin
T. A. Stinson, Gen'l. Storekeeper " " "

Traffic Agencies

(11 agencies are mentioned, including the following):

New York 17, N. Y.,—Phone Murray Hill 6-8135 713 Borden Bldg. John A. Moore, Asst. Genl. Freight Agent"

[fol. 23] No passenger tickets are sold by me nor do I engage in the issuance of time tables. I do keep a few of them in by possession for my own information. The time tables I have seen list the general offices of the said railroad company as Green Bay, Wisconsin, and mention my name and a number of other names of persons in various cities as traffic representatives.

My duties relate solely to the solicitation of freight business over lines of the defendant in Wisconsin affer its carriage by an initial carrier, receiving the shipment in New York, or other point of origin. I do not consummate

shipping arrangements nor make collections, nor settle claims, nor do I make contracts. All of those matters are attended to at the office of the Company in Green Bay, Wisconsin. My function is to influence shippers of goods, to use the line of the defendant railroad company in Wisconsin as a part of the avenue of transportation of such goods. I make all reports of any business I solicit to the office of the company in Green Bay, Wisconsin, and to no other office. All of the busjness I solicit is reported by me to that office and all decisions and approvals are made there. The freight rates are fixed by schedule of the Interstate Commerce Commission. No payments whatever are made to me. The payments are billed from and made to the said defendant in the state of Wisconsin.

I am not an officer of the defendant and have no authority to negotiate or enter into contracts or agreements on its behalf, nor to represent it in any way other than as heretofore stated.

All expenses for maintaining my agency at 350 Madison Avenue, aforesaid, including salaries, are arranged for and paid from the office of the defendant in Green Bay, Wisconsin. The checks which I receive from that office are signed by the auditor of the company, Mr. Louis P. Wohlfeil, General Auditor of the company, who resides in Green Bay, aforesaid.

[fol. 24] The main business of the defendant is the transportation of freight on its lines in Wisconsin. There is very little passenger traffic.

In connection with the business of the company, I have occasion to travel and have, from time to time, visited the office of the company in Green Bay, Wisconsin. The various offices of the company are located on the first and second floors of the railroad station in the City of Green Bay.

I make no reports to, nor do I receive any from, Robert Winthrop & Company at 20 Exchange Place, New York City, nor do I or my secretary refer any inquiry to that office, other than when someone makes inquiry about the payment of interest or dividends on the securities, issued by the defendant.

John A. Moore.

(Sworn to the 16th day of June, 1944.)

[fol. 25] IN UNITED STATES DISTRICT COURT

STIPULATION AMENDING NOTICE OF MOTION

[Same Title]

It is hereby stipulated that the Notice of Motion herein be amended by adding the following clause, to wit:

> "The defendant also moves to dismiss the complaint on the ground that there is a lack of jurisdiction of the subject matter of the action in that the subject matter is concerned with the internal affairs of the defendant, a foreign corporation";

It is further stipulated that the plaintiffs reserve and do not waive their rights to object to such motion to dismiss on the ground that it may not properly be made until the motion to vacate service of the summons is disposed of;

It is further stipulated that the defendant shall serve its memorandum in support of this amended part of this motion on the plaintiffs' attorneys on July 20th, 1944 and that the plaintiffs shall have until July 24, 1944, to serve and file answering affidavits and a memorandum.

Dated: New York, N. Y., July 18, 1944.

Unger & Pollack, Attorneys for Plaintiffs. Cadwalader, Wickersham & Taft, Attorneys for Defendant, appearing specially.

[fol. 26] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF WILLIAM F. UNGER, READ IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

STATE OF NEW YORK,
County of New York, ss:

WILLIAM F. UNGER, being duly sworn, deposes and says:

I am a member of the firm of Unger & Pollack, attorneys for the plaintiffs in the above entitled action. I make this affidavit in opposition to the motion of the defendant to set aside the service of the summons and complaint in this action on the alleged ground that it is not doing business within the State of New York.

At the outset, I desire to call attention to a decision rendered by Mr. Justice Garvin of the New York Supreme Court in an action involving this defendant on the very issue raised by the present motion. In an opinion published in the New York Law Journal of June 6, 1944, a copy of which is annexed hereto marked Exhibit A, in an action entitled Paul Sperling, etc., v. H. E. McGee, et al., in which action Green Bay and Western Railroad Company is named as a defendant, it was held that the Green Bay and Western Railroad Company was doing business within the State of New York and subject to the jurisdiction of the New York Courts. A motion by the defendant in that action to set aside service of the summons and complaint therein was accordingly denied. The opinion written by Mr. Justice Garvin recites in detail the facts as to the presence of the defendant in the State of New York as they appeared in that action.

The present action was commenced in the Supreme Court of the State of New York, County of New York, by service of the summons and complaint on Richard B. Wilson, Assistant Secretary and Assistant Treasurer of the defendant, on April 26, 1944, at 20 Exchange Place, New York, N. Y. On petition filed by the defendant, the action was thereafter removed to this Court.

The action is brought by three individual residents of the City of New York as holders of Class B debentures issued by [fol. 27] the defendant, on behalf of themselves and all other holders of such Class B debentures, to recover the amounts payable on such debentures in lieu of interest and to compel a distribution of earnings in accordance with the provisions of the defendant's Articles of Incorporation and the debentures issued thereunder. Such amounts are, by the express provisions of the debentures, payable "at the office or agency of the Company in the City of New York" upon "production" of the debentures "at such office or agency". The debentures which were first issued in 1896, further provide that they "shall pass by delivery unless registered on the books of the Company at its office or agency in the City of New York, and when so registered, and registry noted thereon, title shall pass only by assignment executed by the last registered owner and noted on such register."

Each debenture specifically provides as follows:

"This instrument shall not be valid for any purpose unless authenticated by the signature of the Farmers'

Loan and Trust Company to the certificate endorsed thereon."

The Farmers' Loan and Trust Company (now City Bank-Farmer's Trust Company) is located in the City of New York and presumably the debentures were authenticated in the City of New York.

On the back of each debenture there is printed in large type:

"Interest Payable
at the office or agency of the Company
in the
City of New York."

From the statements contained in the defendant's own moving affidavits on the present motion, the annexed affidavit [fol. 28] of Ludwig Mandel, an associate of my firm, as well as from the various affidavits filed in the *Sperling* action the following facts appear beyond dispute:

1. The defendant maintains and for many years has maintained two separate offices within the City of New York. One such office is located at 20 Exchange Place (formerly at 48 Wall Street); the other at 350 Madison Avenue.

The office at 20 Exchange Place is maintained with Robert Winthrop & Company, a stock exchange firm, three of whose partners are directors of the defendant. Of these three directors one, Charles W. Cox, is Secretary and Treasurer of the defendant, and receives a salary of $2,000 per annum from the defendant in such capacity. Another, Richard B. Wilson, is Assistant Secretary and Assistant Treasurer of the Company. A fourth director, C. Ledyard Blair, who is Vice-President of the defendant, maintains his office at One Wall Street in the vicinity of 20 Exchange Place. In addition to the salary paid to Mr. Cox, the sum of $2,000 is paid by the defendant annually to the firm of Robert Winthrop & Company for the use of its clerical staff and facilities. All stock and debenture transfers are effected at this office. The stock transfer books of the company are kept at this office. All dividends and distributions to debenture holders are either paid at or mailed from this office.

The office at 350 Madison Avenue is occupied solely by the defendant and its employees under a lease carried in the name of the defendant. At the latter office, John A. Moore,

Assistant General Freight Agent of the Company, is constantly in attendance, as is at least one other employee of the defendant. The said Moore was formerly designated as "General Eastern Agent", but his duties have not changed since such change in his title. The office is primarily a traffic office, from which the defendant solicits and arranges for the routing of freight business. The defendant's passenger business is insignificant, by its own admissions; hence it is apparent there is no need for a passenger agent in this state.

[fol. 29] 2. Five of the six directors of the defendant (as of December 31, 1943 there was apparently one vacancy on the Board) have their office addresses within the City of New York, and at least two of such directors also reside in the City of New York and two others reside in the adjoining State of New Jersey.

3. Directors' meetings are held regularly in the City of New York, in accordance with the by-laws of the defendant. Four such meetings were held in 1943. Presumably the minutes of such meetings are kept at the company's office at 20 Exchange Place.

4. Three executive officers of the defendant are located in New York. They are the Vice-President, C. Ledyard Blair, the Secretary and Treasurer, Charles W. Cox, and the Assistant-Secretary and Assistant-Treasurer, Richard B. Wilson. In addition, John A. Moore, Assistant General Freight Agent of the defendant, is permanently stationed in New York.

5. Two of the three members of the Executive Committee appointed by the Board of Directors are located in New York, namely C. Ledyard Blair and Charles W. Cox. The third member of the Executive Committee is Homer E. McGee, the President of the Company, who resides and maintains his office in Green Bay, Wisconsin. This Executive Committee is "authorized to do all the acts and things that the Board of Directors may legally do", during intervals between directors' meetings.

6. The capital stock and debentures issued by the Company are all listed and traded in on the New York Stock Exchange, and all are transferrable in the City of New York.

7. A letterhead of the defendant shows its address at 20 Exchange Place, New York, N. Y.

[fol. 30] 8. The defendant is listed in the Manhattan telephone directory as follows:

"Green Bay & Western RR Co 350 Mad Av MUrryhill 6-8135"

There is a similar listing in the Manhattan Classified directory under the heading "Railroads".

9. The defendant concedes that it maintains a bank account in New York, and "when there appears to be an excess of operating funds in the Green Bay banks, a portion of such funds have been temporarily transferred," to such account in New York (Wilson moving affidavit, par. 10).

10. The defendant paid an occupancy tax to the City of New York in 1942 and in 1943, and probably in prior years as well.

11. In the registration statement (form 12) filed by the defendant in 1935 with the Securities and Exchange Commission, the name and address of the person authorized to receive notices on behalf of defendant was stated to be "Charles W. Cox, Secretary, Green Bay and Western Railroad Company, 48 Wall Street, New York, N. Y." Annual reports (form 12K) filed by the defendant with the Securities and Exchange Commission contain an attestation clause indicating that each such report, including that filed for the year 1943, had been signed by H. E. McGee as president, and by C. W. Cox as Secretary, and the corporate seal affixed, in the City of New York.

12. The annual report filed by the defendant with the Interstate Commerce Commission for the year ended December 31, 1943 lists five of its six present directors as having New York addresses and in addition lists its Vice-President and Secretary and Treasurer as having their addresses in [fol. 31] New York. In such report, the thirty largest stockholders are stated to own an aggregate of 20,633 shares out of a total of 25,000 outstanding, and twenty-six of these thirty stockholders are listed as having their addresses in New York.

13. An "Official Directory of Industries" published by the defendant in 1943, lists on page 4 thereof the following:

> "New York, N. Y. Room 713 Borden Bldg. 350 Madison Ave. Phone Murray Hill 6-8135. John A. Moore, Assistant General Freight Agent —— ——, General Agent. Sunye Tabenken, Clerk."

On such page also appears the following statement under the heading "Executive Department":

> "Homer E. McGee, President, Green Bay, Wis. Edgar Palmer, Vice-President, 20 Exchange Place, New York, N. Y. Chas. W. Cox, Secretary & Treasurer, 20 Exchange Place, New York, N. Y."

Since the publication of said booklet Edgar Palmer has died, and C. Ledyard Blair of 1 Wall Street, New York, N. Y. has been elected Vice-President, as appears from the defendant's annual report filed with the Interstate Commerce Commission for the year ended December 31, 1943.

14. A timetable published by the defendant and dated December 1939, under the heading of "Traffic Representatives" lists, among others, the following:

> "New York, N. Y. Room 713 Borden Building, John A. Moore, General Eastern Agent Lawrence J. Kelly, Travelling Freight Agent."

[fol. 32] 15. Reports filed with the Interstate Commerce Commission by the defendant's subsidiary, Kewaunee, Green Bay and Western Railroad Company give the address of the defendant as 20 Exchange Place, New York City. These reports are signed by H. E. McGee, who is President of both the defendant and its subsidiary.

16. In Moody's Manual of Investments for 1936 the defendant was listed as having a New York office at 48 Wall Street, New York City, and under the heading "Management" appears the name "C. W. Cox, Chairman, Secretary and Treasurer, New York." Moody's Manual of Investments for 1943 lists the New York office of defendant corporation as 20 Exchange Place, New York City. Standard & Poor's Manual for 1943 lists an office for defendant at 350 Madison Avenue, New York City.

17. As stated in the affidavit of John A. Moore filed on behalf of the defendant in the *Sperling* action, the Official Guide of Railways issued by the National Railways Publishing Company and used extensively in the railroad world sets forth the following:

"Traffic Agencies

* * * * * * *

New York 17, N. Y.,—Phone Murray Hill 6-8135 713 Borden Bldg. John A. Moore Ass't Gen'l Freight Agent."

From the foregoing facts, many of which may be found in the moving affidavits themselves, it is apparent that the defendant is constantly and continuously present in and doing business within the State of New York and hence subject to the process of the courts in this jurisdiction.

Wherefore, I respectfully pray that the defendant's motion be denied in all respects.

Wm. F. Unger.

(Sworn to the 12th day of July, 1944.)

[fol. 33] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF LUDWIG MANDEL, READ IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

[Same title]

STATE OF NEW YORK,
County of New York, ss:

Ludwig Mandel, being duly sworn, deposes and says:

I am an attorney associated with Unger & Pollack, attorneys for the plaintiffs in the above entitled action.

On March 31, 1944 I went to the office of defendant Green Bay and Western Railroad Company at the Borden Building, 350 Madison Avenue, New York City. The defendant occupies an office in said building known as Room 713. The

directory in the lobby of the building lists the Green Bay and Western Railroad Company as well as John A. Moore. There is also a listing on the lobby directory for a Ralph G. Carlson. On the 7th floor on the entrance door to Room 713 the words "Green Bay and Western Railroad Company" appear in large lettering. In smaller letters to the side appears the following:

"John A. Moore Ass't General Freight Agent."

I entered the office and spoke to a young lady seated at a desk in the outer room, in which there were several desks. There are several inner or private offices. The young lady with whom I spoke informed me that the "Treasurer's office" of Green Bay and Western Railroad Company was at 20 Exchange Place, New York City, with Robert Winthrop & Co. I asked her whether any of the officers of Green Bay and Western Railroad Company were to be found at the uptown office. She answered in the negative, stating that Mr. Cox, the Treasurer, was at the downtown office. She further stated that the office at 350 Madison Avenue was used for "solicitation and routing of freight." [fol. 34] I examined a number of reports at the New York Stock Exchange library filed by Green Bay and Western Railroad Company with the Securities and Exchange Commission and with the Interstate Commerce Commission.

On examining the registration statement filed with the Securities and exchange Commission (Form 12), dated May 9, 1935, I found that it had been executed by H. E. McGee as President and C. W. Cox as Secretary. In this statement it was stated that the name and address of the person authorized to receive notices on behalf of the defendant was "Charles W. Cox, Secretary, Green Bay and Western Railroad Company, 48 Wall Street, New York, N. Y." Attached to said Form 12 as an exhibit was a copy of the by-laws of the defendant corporation. Section 2 of Article II thereof reads as follows:

> "The directors may hold their meetings and keep books of the company, except the company s general and principal books of account and stock books which

shall be kept in the State of Wisconsin, *in the State of New York* and at such other place or places within or without the State of Wisconsin as the Board of Directors may from time to time determine." (Emphasis supplied.)

Section 1 of Article II provides for seven directors. Sections 1 and 2 of Article III deal with the appointment and duties of an Executive Committee. Section 1 provides:

"The Board of Directors may in its discretion by resolution adopted by a majority of the whole Board designate an Executive Committee composed of not less than three members of the Board. The Executive Committee shall elect from among its members its own chairman."

[fol. 35] Section 2 provides:

"During the intervals between the meetings of the Board of Directors, the Executive Committee shall possess and may exercise all the powers of the Board of Directors * * *"

Section 5 of Article IV of said by-laws provides:

"The Secretary shall keep the minutes of all meetings of the Board of Directors and of the stockholders and such other minutes and books and records as the Board of Directors may direct; he shall keep in safe custody the seal of the company * * *"

I examined also the annual reports filed by the defendant with the Securities and Exchange Commission (Form 12K), including the annual report for the year ended December 31, 1943. I found that each of such reports contained an attestation clause indicating that it had been signed by H. E. McGee as President, and by C. W. Cox as Secretary, and the corporate seal affixed, *in the City and State of New York.*

I examined also the annual report filed by the defendant with the Interstate Commerce Commission for the year

ended December 31, 1943. The following were listed as the directors of the company:

Name	Director's Office Address	Date of Beginning of Term 1943	Date of Expiration of Term 1944	No. of Voting Shares Owned of Record
C. Ledyard Blair	1 Wall St., New York.	May 13	May 11	2
Charles W. Cox	20 Exchange Place, New York.	"	"	1800
[fol. 36]				
Robert Winthrop	20 Exchange Place, New York.	"	"	1
J. M. Davis	140 Cedar Street, New York.	"	"	51
H. E. McGee	Green Bay, Wisconsin.	"	"	1200
Richard B. Wilson	20 Exchange Place, New York.	"	"	796

The following were listed as the general officers of the company:

Title	Department or Departments Over Which Jurisdiction is Exercised	Name of Person Holding Office at Close of Year
President	Executive	H. E. McGee, Green Bay, Wisconsin.
Vice-President	Executive	C. L. Blair, 1 Wall St., N. Y.
Secretary	Fiscal	C. W. Cox, 20 Exchange Place, New York.
Treasurer	Treasury	C. W. Cox, 20 Exchange Place, New York.
General Auditor	Accounting	L. P. Wohlfeil, Green Bay, Wisconsin.
Purchasing Agent	Purchasing	J. M. Zahorik, Green Bay, Wisconsin.
Chief Engineer	Way and Structure	F. S. Halladay, Green Bay, Wisconsin.

[fol. 37] In said report to the Interstate Commerce Commission it was stated that as of December 31, 1943, the 30 largest stockholders owned an aggregate of 20,633 shares of stock out of a total of 25,000 outstanding. Of these 30, all but four were listed as having New York addresses.

The report also indicated that during the year 1943 the defendant had paid a New York tax in the sum of $1.00. A similar tax was paid in the year 1942, as appears from a similar report filed for the year ended December 31, 1942.

In said report the Chairman of the Board of Directors is stated to be C. W. Cox, and the Secretary of the Board is stated to be Robt. Winthrop.

The Executive Committee is stated to consist of the following persons:

C. Ledyard Blair
Charles W. Cox
H. E. McGee

There is also a statement that "the Executive Committee is authorized to do all the acts and things that the Board of Directors may legally do." A similar statement is contained in the report to the Interstate Commerce Commission for the year ended December 31, 1941.

In the annual report filed with the Interstate Commerce Commission for the year 1942 by Kewaunee, Green Bay and Western Railroad Company, signed by H. E. McGee as President, the defendant Green Bay and Western Railroad Company is listed as a security holder and its address is stated as 20 Exchange Place, New York, N. Y.

I have seen a copy of an "Official Directory of Industries" published by the defendant in 1943. On page 4 thereof appears the following:

"New York, N. Y. Room 713 Borden Bldg. 350 Madison Ave. Phone Murray Hill 6-8135. John A. Moore, Assistant General Freight Agent. —— ——, General Agent. Sunye Tabenken, Clerk."

[fol. 38] Under the heading "Executive Department", there also appears the following:

"Homer E. McGee, President, Green Bay, Wis. Edgar Palmer, Vice-President, 20 Exchange Place, New York, N. Y. Chas. W. Cox, Secretary & Treasurer, 20 Exchange Place, New York, N. Y."

Ludwig Mandel.

(Sworn to the 12th day of July, 1944.)

Exhibit "A"

(Attached to Opposing Affidavit of William F. Unger)

Opinion of Mr. Justice Garvin of the New York Supreme Court, Kings County, in an Action Entitled Paul Sperling, etc., v. H. E. McGee et al., Published in the New York Law Journal of June 6, 1944

Defendant Green Bay & Western Railroad Company moves to set aside the service of the summons and complaint on the ground that defendant is a foreign corporation organized under the laws of the State of Wisconsin, is not transacting business within the State of New York and that consequently the court has no jurisdiction of the person of defendant, and further, that said service is in violation of the Constitution of the United States, and particularly section 1 of the Fourteenth Amendment thereof.

The moving affidavit of Richard B. Wilson, upon whom service was made, sets forth in part the following facts which do not appear to be in dispute: He is a resident of the State of New York and a general partner in the firm [fol. 39] of Robert Winthrop & Co., stock and bond brokers, having a membership on the New York Stock Exchange and offices at No. 20 Exchange place, New York City; in addition, he is a director and assistant secretary and assistant treasurer of said company; that a charter to said company was issued by the State of Wisconsin, but the company has not filed a certificate of doing business in New York State, nor has it designated a person within this state upon whom process may be served. All its railroad lines, stations and physical properties are situated in the State of Wisconsin; its principal office is at Green Bay, where its president and most of its other operating officers reside and have their offices from which operation of the railroad is carried on. No books of the company having to do with its business are in New York; its main operating bank account is in Green Bay; Charles W. Cox, another general partner of said Robert Winthrop & Co., is a director of the company, and he is also its secretary and treasurer; although he resides in New Jersey, he devotes most of his time to the pursuit of his duties as a partner of said firm at No. 20 Exchange Place, New York City; he receives a salary of $2,000 a year as secretary and treasurer of the company.

The duties of Wilson as assistant secretary and assistant treasurer of the company are confined practically to nothing more than the supervision of stock transfers and other details relating to distribution on the various outstanding securities and related questions; he receives no salary from the company. The Class A Debentures and Class B Debentures are payable "at the office or agency of the company in the City of New York"; the capital stock of the company is transferable in the same place. The company does not employ an outside bank or trust company to act as transfer agent or paying agent; these details are attended to at the office of Robert Winthrop & Co., at No. 20 Exchange Place, under the direction of Cox, secretary and treasurer and Wilson as assistant secretary and assistant treasurer. The clerical force of Robert Winthrop & Co. is used to the extent [fol. 40] necessary for three purposes; that firm is paid about $2,000 a year for their services. Largely for requirements in connection with sending out distribution checks and returning bearer debentures to their owners after presentation for notation of interest payments, a letterhead of the company is used with the address shown as No. 20 Exchange Place, New York, N. Y.

A bank account is maintained in connection with prospective payments of distributions and securities of the company, and at times when there appeared to be an excess of operating funds in the Green Bay banks, a portion of such funds have been temporarily transferred to the company's bank account in New York. Up to the time of his death in January, 1943, Edgar Palmer, a vice-president and director of the company, resided and was available to it, when needed, in the New York area.

For a period of years the company has maintained a traffic office in New York City, which is now at No. 350 Madison avenue, in charge of John A. Moore; his duties are limited to the solicitation of freight business for trans-shipment over the lines of the company in Wisconsin; the office force consists of the agent Moore and his secretary; the lease for the space was signed by the president of the company in Green Bay and all expenses and salaries are paid by checks issued in Green Bay; no passenger tickets are sold at this office nor at any other office within New York State; directors' meetings are usually held in New York City at the said office of Robert Winthrop & Co.; during 1943, four such meetings were held; two of the directors reside in

New Jersey, two in New York; stockholders' meetings are held in Green Bay, Wisconsin.

In the building at No. 20 Exchange place are located the offices of Robert Winthrop & Co., as stated, the Estate of Edward Palmer (former vice-president of the company) and City Bank Farmers Trust Company, trustees of the debentures; the name of the defendant company does not appear upon the bulletin board of the aforesaid building, nor upon any of the doors of the office occupied by the said brokerage firm.

[fol. 41] The corroborating affidavit of John A. Moore adds additional facts, the most important of which are that he is an assistant general freight agent and that formerly his title was that of General Eastern Agent, although his duties under both titles have been and are the same; that the Official Guide of Railways lists the general office of the company at Green Bay and the office at No. 350 Madison avenue, as one of the eleven traffic agencies; that he is not engaged in the solicitation of business to be brought into the State of New York.

It appears that the Madison avenue office is listed in the telephone book under the company's name and is also listed in the directory in the building under the name "Green Bay and Western Railroad Company, John A. Moore, Assistant General Freight Agent".

It is stated in the company's annual report to the Interstate Commerce Commission for the year ended December 31, 1942 (the latest report available), that Cox is the fiscal officer and in charge of the treasury department of the company; his address is given as No. 20 Exchange place, New York, N. Y.

The company has an executive committee, consisting of three persons, namely, C. Ledyard Blair of No. 1 Wall street, New York City, Charles W. Cox of No. 20 Exchange place, New York City, and H. E. McGee of Green Bay, Wisconsin, which committee "has authority to do all the acts and things that the board of directors may legally do;" it is asserted, and not controverted, that there have been no executive committee meetings during the last twenty years.

In Moody's Manual of Investments of 1936, the company was listed as having a New York office at No. 48 Wall street, New York City, and under the heading of "Management" appeared the name "C. W. Cox, Chairman, Secretary and Treasurer, N. Y." The same manual for 1943 lists the New

York office of the company as No. 20 Exchange place, New York City. Standard & Poors Manual for 1943, lists an office for the company at No. 350 Madison avenue. A time [fol. 42] table of the company under the heading "Traffic Representatives" lists, among others, John A. Moore as general eastern agent, with his office at No. 350 Madison avenue. The "Official Directory of Industries" prepared by the defendant railroad's "Freight Traffic Department", sets forth on page 4 thereof the following: "Homer E. McGee, President Green Bay, Wisconsin; Edgar Palmer, Vice-President, 20 Exchange Place, New York, N. Y.; Chas. W. Cox, Secretary and Treasurer, 20 Exchange Place, New York, N. Y.".

No comprehensive rule has ever been established determining what constitutes doing business by a foreign corporation so as to subject it to process in a given jurisdiction. Each case must be determined upon its own facts (*St. Louis Southwestern R'y* v. *Alexander*, 227 U. S. 218; *Pomeroy* v. *Hocking Valley R'y*, 218 N. Y., 530).

It has been held that not so great a degree of business activity is required to authorize service as in the case of taxing or licensing; it is sufficient if there be enough to warrant the inference that the foreign corporation is present in the state (*Tauza* v. *Susquehanna Coal Co.*, 220 N. Y. 259, 267; *Internat. Text Book Co.* v. *Tone*, 220 N. Y., 313).

The brief of the moving defendant discusses the merits of the action, but for the purposes of this motion there should be no inquiry of that character.

The question which the court must decide is whether from all the facts and surrounding circumstances hereinbefore set forth, it may be reasonably held that the company is engaged in business in New York State, to such an extent as to subject it to process in this jurisdiction.

If each of the foregoing facts were to be considered separately, as a sole basis upon which to predicate a conclusion, then the objection of the company would be valid. In other words, the conduct of this freight agency in New York would not, in and of itself, constitute doing business in New York State; the fact that the obligations of the company were payable here would not, taken alone, constitute doing business [fol. 43] in New York State; the same is true of the fact that the corporation stock was transferable and its dividends were paid at the office of Robert Winthrop & Co.; also the presence of an officer and the occasional meetings of di-

rectors in this state would not be doing business here. But, when all these activities are taken together, in addition to the fact that the directors usually meet in New York, that the company maintains a bank account here which admittedly contains funds other than those required to meet prospective payments of distributions on the securities, the court is constrained to the conclusion that the said foreign corporation is present in New York and is, therefore, subject to the process of our courts. The various references to the company in the manuals, without objection or correction, indicate not only that the company had no objection to being considered a part of the business world of New York, but that it was quite willing that such an impression should be accepted by those having occasion to do business with it, as true.

Paraphrasing the language of the court in *Tauza* v. *Susquehana Coal Co.* (supra) from the facts hereinbefore recited, it may be clearly inferred that the company is here, not occasionally or casually, but with a fair measure of permanence and continuity and that therefore the service upon Richard B. Wilson was good. The motion to set aside the service herein is denied.

[fol. 44] IN UNITED STATES DISTRICT COURT

REPLY AFFIDAVIT OF RICHARD B. WILSON, READ IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

[Same title]

(Civil 26-194)

STATE OF NEW YORK,
County of New York, ss:

Richard B. Wilson, being duly sworn, deposes and says as follows:

1. This reply affidavit is made in support of a motion to set aside the service of the summons and complaint herein and in reply to the answering affidavits of William F. Unger and Ludwig Mandel, both sworn to July 12, 1944.

2. In the action between *Paul Sperling, etc.* v. *H. E. McGee, et al.*, wherein Green Bay and Western Railroad

Company is also named as defendant, an order was signed by the Supreme Court, Kings County, through Mr. Justice Edwin L. Garvin, denying the motion of the said defendant to set aside service of the summons and complaint. An appeal has been taken therefrom to the Appellate Division of the Supreme Court, Second Department. An order has been made by that court dated June 19, 1944, in connection with the motion for a stay on appeal, granting the stay upon condition that the appeal be perfected and be ready for argument for the October Term, commencing September 25, 1944.'

3. The Occupancy Tax, referred to in paragraph 10 of the Unger affidavit, was levied by the City of New York for the freight business, conducted from the office at 350 Madison Avenue, Borough of Manhattan, and the said tax was paid from the office of the defendant at Green Bay, Wisconsin.

[fol. 45] 4. The annual report to the Securities and Exchange Commission is signed by the President, Mr. M. E. McGee in Green Bay, Wisconsin, and then signed by Mr. Cox, as Treasurer, in New York. In substance, the report sets forth the amount of securities which have been registered and the description of existing reports of any contracts between the corporation and its subsidiaries and directors. The report also called for the name and address of the person authorized to receive notices and communications from the Securities and Exchange Commission and, in the answer to that question, Mr. Cox's name was inserted with his address as 20 Exchange Place, New York, N. Y.

5. The annual reports to the stockholders of the defendant are prepared by the General Auditor in Green Bay, Wisconsin and submitted by him to Mr. Cox for signature.

6. The defendant's annual reports to the Interstate Commerce Commission, which are voluminous reports of operating data, consist of some 134 pages in printed form, are prepared in Green Bay, Wisconsin, by the General Auditor and are signed and sworn to in Green Bay, Wisconsin, by the President and the General Auditor. In addition thereto, at the bottom of the first page of said reports is the following: "Name of officer in charge of correspondence with the Commission regarding this report; L. P. Wohlfeil; official title—General Auditor; office address—Green Bay, Wisconsin.

7. Paragraph 13 of the Unger answering affidavit refers to an "Official Directory of Industries" which lists, among other officers, Edgar Palmer, Vice-President, with his office at 20 Exchange Place, New York, N. Y. It further states that since the death of Mr. Palmer, Mr. C. Ledyard Blair, of 1 Wall Street, New York, N. Y., has been elected Vice-President. Mr. Edgar Palmer was Chairman of the Board of New Jersey Zinc Company and devoted none of his time to any duties as Vice-President of the defendant. The sole [fol. 46] reason for election was to have available in the New York area, in case of emergency, someone who could sign stock certificates of the corporation in connection with transfers. After the death of Mr. Palmer, C. Ledyard Blair was elected a Vice-President, but he has never qualified by obtaining the consent of the Interstate Commerce Commission and he has never served in such capacity.

8. The answering affidavits referred to the Executive Committee of the defendant as consisting of C. Ledyard Blair, Charles W. Cox and H. E. McGee. It is true that these men have been appointed from year to year as members of the Executive Committee. However, no meeting of the Executive Committee has been held for the last twenty years.

Richard B. Wilson.

(Sworn to the 14th day of July, 1944.)

[fol. 47] IN UNITED STATES DISTRICT COURT

SUR-REPLY AFFIDAVIT OF LUDWIG MANDEL, READ IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

[Same title]

(Civil 26-194)

STATE OF NEW YORK,
County of New York, ss:

Ludwig Mandel, being duly sworn, deposes and says:

I am an attorney associated with Unger & Pollack, attorneys for the plaintiffs in this action.

The Class B Debentures of Green Bay and Western Railroad Company are listed on the New York Stock Exchange as bonds.

The reply affidavit of Richard B. Wilson admits that an Executive Committee, consisting of three members, two of whom are present in New York, has been appointed from year to year by the Board of Directors, but states that the Executive Committee has held no meetings for the last twenty years. The inescapable inference from these facts is that the Committee has been functioning informally throughout the years; otherwise the Board of Directors would not have indulged in the useless gesture of making annual appointments.

Ludwig Mandel.

(Sworn to the 24th day of July, 1944.)

[fol. 48] IN UNITED STATES DISTRICT COURT

OPINION OF CAFFEY, D. J.

[Same title]

(Civ. 26-194)

The defendant has made two motions. One is to set aside service of the summons and complaint on the ground that the defendant (a Wisconsin corporation) is not doing business in New York. The other is to dismiss the complaint because there is lack of jurisdiction of the subject matter, which concerns the internal affairs of the defendant.

The motions were the last item on the calendar at my recent sitting in the motion part. I was compelled to reserve decision in a considerable number of cases. So much attention was required on those having priority that time now is not available for extensive discussion in the instant case. I must content myself, therefore, with briefly indicating the reasons for my conclusions.

A suit against the defendant similar to this was brought in the Supreme Court, Kings County, New York, the short title of which is *Sperling* v. *McGee*. The attorneys for the plaintiffs in *Sperling* v. *McGee* do not represent the plaintiffs in the present case (originally brought in the Supreme Court, New York County, and removed to this court).

The identical question raised by the pending first motion was also raised in *Sperling* v. *McGee*. The latter was ruled against by Mr. Justice Garvin. His opinion was published

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in the New York Law Journal of June 6, 1944, and a copy is annexed as Exhibit A to the affidavit herein of counsel for the plaintiffs verified July 12, 1944.

After study of all the papers bearing on the instant first motion, I concur in the substance of the findings of facts set out in the opinion of Mr. Justice Garvin. I concur also in his conclusion that the defendant "is present in the state"; that is, that in the sense of the applicable court decisions the defendant is and for some time past continuously has been doing business in New York (*Pomeroy* v. *Hocking Valley* [fol. 49] *Railway Co.*, 218 N. Y. 530, 533-536, and *Tauza* v. *Susquehanna Coal Co.*, 220 N. Y. 259, 266. Cf. *Frene* v. *Louisville Cement Co.*, Ct. App. D. C., 134 Fed. (2d) 511, 515-518).

The affidavits in this case add a good deal to the facts as summarized by Mr. Justice Garvin; but I do not think they materially alter the pertinent features of the situation as it stood when *Sperling* v. *McGee* was before him.

Section 229 of the New York Civil Practice Act prescribes how service in this State of a summons shall be made on a foreign corporation and designates those to whom a copy shall be delivered in order to effect the service. Among the individuals on whom subdivision 1 authorizes such service are an assistant treasurer and an assistant secretary of the corporation. Rule 4 (d) (3) and (7) provides that service on a foreign corporation shall be by delivering a copy of the summons and complaint, among others, to an officer "in the manner prescribed by the law of the state in which the service is made." In this case the service was made in that way in New York on an assistant treasurer, who was as well an assistant secretary, of the defendant.

In my view the service was good (*Eddy* v. *Lafayette*, 163 U. S. 456, 464. Cf. *Jacobowitz* v. *Thomson*, 2 Cir., 141 Fed. (2d) 72, 74-6). In consequence I think the first motion should be denied.

We turn now to the question whether there is, or should be exercised, jurisdiction of the subject matter.

The defendant has issued and there are outstanding (1) Common Stock, (2) Class A Debentures and (3) Class B Debentures. The holders of the first and second are entitled to payment of annual installments of 5% on their face prior to any payments to holders of the third.

As the plaintiffs assert, in the complaint (paragraph 6), by the terms of the defendant's articles of incorporation

and of the Class B Debentures, the holders thereof are entitled "to receive in lieu of interest thereon any net earnings of the railroad and property in each year remaining after payment of five per cent upon the said Class A [fol. 50] debentures and the said stock." In addition the complaint (paragraph 6) alleges that the articles of incorporation provide that "Such surplus net earnings, if any, to be paid to and distributed among the holders of Class B Debentures pro rata and the said debentures to contain such further provisions as may be agreed upon between the Company and the said purchasers."

In the complaint it is also alleged (paragraph 10) that between 1924 and 1943 the sum of $155,000 was required to be paid to the holders of the capital stock and Class A Debentures; further that the aggregate of such net earnings, "after deducting reserves for additions, general improvements and depreciation, and after deducting said sum of $155,000 in each of said years," was approximately $1,649,000; and further (paragraph 11) that during the whole of such period the total payment to the holders of the stock and the Class B Debentures was approximately $840,000, thus leaving $809,000 (accumulated and held in surplus account) to which the plaintiffs allege (paragraph 14) such holders are entitled and for which, in behalf of all the holders, the plaintiffs sue.

In other words, among other things, the plaintiffs seek an interpretation of Wisconsin law, of the articles of incorporation and of the B debentures which, without permitting discretion to be exercised by the directors, would force the defendant to pay to the B holders all surplus earnings for each year since 1924 after annually paying the holders of the common stock and of the A debentures 5% of the face thereof.

It seems to me manifest that the law-suit is a litigation which inevitably and necessarily involves the internal affairs of the defendant.

Moreover, all the physical properties of the defendant which are operated and from which it derives earnings are located in Wisconsin, the state of its incorporation. It is there its main office and principal place of business are situated. There also its chief records are kept.

If I be right in thinking that the pending action hinges around and must turn on the internal affairs of the [fol. 51] defendant, then this court is authorized to decline

to retain jurisdiction of it (*Rogers* v. *Guaranty Trust Co.*, 282 U. S. 123, 130-1, and *Cohn* v. *Mishkoff Costello Co.*, 256 N. Y. 102, 105. Cf. *Cohn* v. *American Window Glass Co.*, 2 Cir., 126 Fed. (2d) 111, 113).

If I be right as to internal affairs of the defendant being involved in the present suit, then it is within the discretion of this court to dismiss it. I think that it should be dismissed, without prejudice to its being renewed in Wisconsin.

I rest the position stated on two grounds: (1) The defendant should not be put to the burden and expense of carrying on the litigation so far away as New York from its home State of Wisconsin. (2) When avoidable, the full calendars of this court should not be further crowded by adding another suit of substantial proportions (such as this obviously is) when there is open to the plaintiffs another forum, which is not only equally capable, but more accessible to the defendant.

I feel, therefore, that the second motion should be granted.

On the other hand, if my second ruling be erroneous, there will be a compensating advantage in the course I have adopted. This is that prior to going on with what is likely to be an extensive proceeding, at slight expense, an authoritative holding can be obtained from an appellate court with respect to whether I am wrong.

On two days' notice settle order accordingly with respect to both motions.

Dated, August 1, 1944.

Francis G. Caffey, United States District Judge.

[fol. 52] In United States District Court

Order and Judgment Appealed From

[Same Title]

(Civil 26-194.)

The defendant having moved by notice of motion dated June 19, 1944, as amended by stipulation between the parties dated July 18, 1944, (1) to set aside the service of the summons and complaint herein and dismiss said complaint

on the ground that the defendant, a foreign corporation, is not doing business within the State of New York and therefore that the Court lacks jurisdiction over the person of the defendant, and (2) to dismiss said complaint on the ground that there is a lack of jurisdiction of the subject-matter of the action in that the subject-matter is concerned with the internal affairs of the defendant, a foreign corporation, and said motions having come on to be heard before this Court on July 18, 1944,

Now, upon reading and filing the said notice of motion dated June 19, 1944, the stipulation between the parties amending the same dated July 18, 1944, the transcript of the record of the above entitled action (begun in the Supreme Court of the State of New York, New York County, and removed therefrom to this Court) filed in this Court June 15, 1944, the affidavits of Richard B. Wilson sworn to the 17th day of June, 1944 and the 14th day of July, 1944, respectively, and the affidavit of John A. Moore, sworn to the 16th day of June, 1944, all in support of said motions, and the affidavit of William F. Unger sworn to July 12, 1944, and the affidavits of Ludwig Mandel, sworn to July 12, 1944 and July 24, 1944, respectively, all in opposition to said motions and after hearing Cadwalader, Wickersham & Taft (Walter Bruchhausen, of counsel), in support of said motions, and after hearing Unger & Pollack (William F. Unger, of counsel) in opposition to said motions, and the Court having filed a written opinion dated August 1, 1944, it is

Ordered, that the said motion to set aside the service of the summons and complaint and to dismiss said com- [fol. 53] plaint on the ground that the defendant, a foreign corporation, is not doing business within the State of New York and that the Court lacks jurisdiction over the person of the defendant, be and the same is hereby in all respects denied, and it is

Further Ordered and Adjudged that the said motion to dismiss the complaint on the ground that there is a lack of jurisdiction of the subject-matter of the action in that the subject-matter is concerned with the internal affairs of the defendant, a foreign corporation, be and the same is hereby in all respects granted, and that said complaint be and the same is hereby dismissed, without prejudice however to the said plaintiffs to institute a like or similar action

in the State of Wisconsin, which is the state of incorporation of the defendant.

Dated, New York, N. Y., August 9th, 1944.

Approved: Simon H. Rifkind, United States District Judge.

Judgment Rendered, George J. H. Follmer, Clerk.

August 9, 1944.

[fol. 54] In United States District Court

Notice of Appeal

[Same Title]

(Civil 26-194.)

Sirs:

Notice Is Hereby Given that the plaintiffs above named hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from so much of the order and judgment entered in this action on August 9, 1944, as granted defendant's motion to dismiss the complaint on the ground that there is a lack of jurisdiction of the subject matter of the action in that the subject matter is concerned with the internal affairs of a foreign corporation, and from so much of said order and judgment as dismissed the complaint.

Dated, New York, August 31st, 1944.

Yours, etc., Unger & Pollack, Attorneys for Plaintiffs, Office & P. O. Address: 111 Broadway, New York, N. Y.

To: Cadwalader, Wickersham & Taft, Esqs., Attorneys for Defendant, Appearing Specially, 14 Wall Street, New York, N. Y.; George J. H. Follmer, Esq., Clerk of the Court.

[fol. 55] IN UNITED STATES DISTRICT COURT

STIPULATION DESIGNATING CONTENTS OF RECORD

(Pursuant to Rule 75[f])

[Same Title]

It Is Hereby Stipulated and Agreed by and between the undersigned that, pursuant to Rule 75 (f) of the Federal Rules of Civil Procedure, there shall be included in the record on appeal herein only the following:

1. Statement pursuant to Rule 13.
2. Complaint.
3. Defendant's notice of motion dated June 19, 1944 to dismiss the complaint on the ground that there is a lack of jurisdiction over the person.
4. Stipulation dated July 18, 1944 amending defendant's notice of motion to add the further ground that there is a lack of jurisdiction of the subject matter of the action.
5. Supporting affidavit of Richard B. Wilson, sworn to June 17, 1944.
6. Supporting affidavit of John A. Moore, sworn to June 16, 1944.
7. Opposing affidavit of William F. Unger, sworn to July 12, 1944.
8. Opposing affidavit of Ludwig Mandel, sworn to July 12, 1944.
9. Reply affidavit of Richard B. Wilson, sworn to July 14, 1944.
10. Reply affidavit of Ludwig Mandel, sworn to July 24, 1944.
11. Opinion of Caffey, D. J., dated August 1, 1944.
12. Order and judgment appealed from, dated August 9, 1944.

[fol. 56] 13. Notice of appeal dated August 31, 1944 and filed September 1, 1944.

14. This stipulation.
15. Stipulation as to record.
16. Clerk's certificate.

It Is Further Stipulated and Agreed that the plaintiffs-appellants need not serve a statement of the points on which

they intend to rely on this appeal as required by Rule 75 (d) of the Federal Rules of Civil Procedure.

Dated, New York, September 5, 1944.

Unger & Pollack, Attorneys for Plaintiffs-Appellants. Cadwalader, Wickersham & Taft, Attorneys for Defendant-Appellee.

IN UNITED STATES DISTRICT COURT

STIPULATION AS TO RECORD

[Same Title]

It Is Hereby Stipulated and Agreed that the foregoing is a true transcript of the record of this Court in the above entitled matter as agreed on by the parties.

Dated: New York, October 14th, 1944.

Unger & Pollack, Attorneys for Plaintiffs-Appellants. Cadwalader, Wickersham & Taft, Attorneys for Defendant-Appellee.

[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 58] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1944

No. 207

(Argued January 12, 1945. Decided February 9, 1945)

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, suing on behalf of themselves and all other holders of Class B Debentures of Green Bay and Western Railroad Company, Plaintiffs-Appellants,

vs.

GREEN BAY AND WESTERN RAILROAD COMPANY, Defendant-Appellee

Before: Chase, Hutcheson and Frank, Circuit Judges

Appeal from the District Court of the United States for the Southern District of New York. Affirmed.

Unger & Pollack (Milton Pollack and Ludwig Maindel, *of counsel*) for Appellants. Cadwalader, Wickersham & Taft (Merrill M. Manning and Walter Bruchhausen, *of counsel*) for Appellee.

[fol. 59] HUTCHESON, *Circuit Judge*:

Brought by appellants on behalf of themselves and other holders of Class B debentures[1] against appellee, a corpora-

[1] This is the form of the debenture sued on:

United States of America
Green Bay and Western Railroad Company
State of Wisconsin.
$1000. Class B Debenture No. —

The Green Bay & Western Railroad Company hereby certifies that this is one of a series of Seven thousand of its Class B Debentures in the sum of One Thousand Dollars each, aggregating in all the sum of Seven Million Dollars, which sum of One Thousand Dollars will be payable to the bearer hereof, or if registered, to the person appearing on the books of the said Company as the last registered owner hereof, only in the event of a sale or reorganization of the

[fol. 60] tion organized and existing under the laws of Wisconsin, the suit sought judgment for $809,618.85 alleged to belong to the holders of the debentures as their share of the undistributed and withheld net earnings of defendant for the years 1924 to 1943, inclusive. It was alleged that the debentures constituted a fixed and binding contract for the appropriation and payment to the holders, of the net earnings; that the provision [2] requiring action by the directors was a mere formality; that during the years in question the [fol. 61] net earnings applicable to Class B debentures had aggregated $1,649,618.15; that though in each year except the years 1932, 1933 and 1934, the defendant had distributed part of the applicable net earnings in the aggregate sum of $840,000.00, it had in each year withheld portions thereof and passed them to surplus; and that such sums, so wrongfuliy passed to surplus instead of being paid on the debentures; now aggregated the sum for which plaintiffs sued.

Railroad and property of said Company, and then only out of any net proceeds of such sale or reorganization which may remain after payment of any liens and charges upon such railroad or property, and after payment of Six hundred thousand Dollars to the holders of a series of debentures known as Class A, issued or to be issued by said Company, and the sum of Two Million, five hundred thousand Dollars to and among the stockholders of said Company. Any such net proceeds remaining after such payments shall be distributed pro rata to and among the holders of this series of Class B Debentures. The said Railroad Company Hereby Covenants and Agrees that no mortgage shall at any time be placed upon its railroad and other property, nor shall the same be leased or sold without the consent of the holders of seventy five per cent of the capital stock outstanding at the time of such mortgage lease or sale. The said Railroad Company Hereby Agrees that until such payment, the holders of this Series of Debentures shall in lieu of

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[2] "The amounts, if any, payable upon the debentures out of the net earnings in any year will be fixed and declared by the Board of Directors on or before the first day of February in the following year, and when so declared any amount payable will be paid at the office or agency of the company in New York on or before the first day of March in each year to the holder of the debentures."

The defendant met the suit with two motions to dismiss. In one of them, the ground taken was lack of jurisdiction over the person of the defendant for want of proper service on it. In the other it was that, in the exercise of a sound discretion, jurisdiction of the action should not be assumed because its subject matter was concerned with the internal affairs of a corporation foreign to the state of suit.

Affidavits and counter affidavits having been filed and heard on the motions, the district judge, holding that the defendant was present in the district and was properly served, denied the first motion. Of the opinion though that the suit concerned the internal affairs of the defendant corporation and could be better tried in Wisconsin, the state of its incorporation, the district judge, on the authority of *Rogers* v. *Guaranty Trust Co.*, 282 U. S. 123; *Cohn* v. *Mishkoff*, 256 N. Y. 102, *Cohn* v. *American Window Glass Co.*, 126 F. (2) 111, exercised his discretion to dismiss the suit without prejudice to its being renewed in Wisconsin.

Appellants are here insisting that the doctrine of *forum non conveniens*, on which the dismissal was based, was not properly applied, that discretion was abused in dismissing the suit, and, because it was, the judgment must be reversed. We do not think so.

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interest thereon participate in the distribution of annual net income to the following extent, viz.,—so much of the annual net earnings of the said Company in any years as would be applicable to the payment of dividends on stock shall be applied as follows, viz.,—To the holders of Class A Debentures 2½ per cent upon the face value thereof, or if such annual net earnings are insufficient for the payment of the same, then all such net earnings shall be distributed pro rata among the holders of said Class A Debentures. After the payment of 2½ per cent upon the face value of Class A Debentures, the stockholders of the Company are entitled to receive the balance of such net earnings until 2½ percent shall have been paid out of the same upon the par value of the said stock, and all surplus net earnings then remaining shall be paid to the holders of Class A Debentures and of the stock pro rata until five per cent shall have been paid upon the face value of said Debentures and upon the par of said stock for such year, and any surplus net earnings arising in such year which may then remain shall be paid to and distributed among the holders of Class B Debentures

If we could agree with appellants' assumption that the suit involved nothing except a claim upon a liquidated de- [fol. 62] mand, that in short the contract of the Class B debentures operated of itself to set apart and appropriate each year to those debentures the specific sums plaintiffs sue for, and that the fixing and declaration of the amounts by the Directors was a mere formality, we should agree that jurisdiction ought not to have been declined. But we think it clear that this is an over-simplified view of what the debentures intended to, and did, provide. The provision for declaration and payment of sums due annually under the debentures, as well as the long continued practice under it for the many years in question, leave in no doubt, we think, that before any sums became due and payable under the debentures, corporate action had to be taken to fix and determine them. Instead of carrying a fixed rate of interest, the debentures promised, in lieu thereof, a contingent portion of the annual net earnings, this interest to be ascertained, fixed and declared in each year by the directors. According to the claim, the directors in each of the years but three fixed and declared, and the appellee paid the amounts determined to be due. If, therefore, support were needed for

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pro rata. None of such payments shall be cumulative. The amounts, if any, payable upon this series of debentures out of the net earnings in any year, will be fixed and declared by the Board of Directors on or before the first day of February, in the following year, and when so declared, any amount payable hereon will be paid at the office or agency of the Company in the City of New York on or before the first day of March, in such year to the holder of this debenture, upon its production at such office or agency in order that such payment may be stamped hereon; or, if registered, payment will be made by check mailed to the person appearing on the books of this company as the registered owner hereof at the last address furnished by him to this company. This debenture shall pass by delivery unless registered on the books of the Company at its office or agency in the City of New York, and when so registered, and registry noted hereon, title thereto shall pass only by assignment executed by the last registered owner and noted on such register. This instrument shall not be valid for any purpose unless authenticated by the signature of the Farmers' Loan and Trust Company to the certificate endorsed hereon.

the view that the provision in the debentures, that the sums, if any, due were to be fixed and declared by the directors, meant just that, the long practise in accordance therewith and the long acquiescence of the debenture holders in that practise would provide it. The question before us is not one of jurisdiction but one of the exercise of judgment as to which would be the most convenient forum. In the circumstances this case provides, it seems quite clear to us that in declining jurisdiction and remitting the parties to that of Wisconsin, where both corporation and directors can be sued and all matters governing the rights of the corporation and the holders of its securities can be determined under the laws of that state, the court used, it did not abuse, its discretion. Its order dismissing the action without prejudice to the right to renew it in Wisconsin is accordingly Affirmed.

[fol. 63] FRANK, *Circuit Judge*, dissenting:

1. To explain my reasons for dissenting, it is first necessary to state some of the facts more fully than they are stated in the majority opinion.

The debentures provide: "After the payment of 2½ per cent upon the face value of Class A Debentures, the stockholders of the Company are entitled to receive the balance of such net earnings until 2½ per cent shall have been paid out of the same upon the par value of the said stock, and all surplus net earnings then remaining shall be paid to the holders of Class A Debentures and of the stock pro rata until five per cent shall have been paid upon the face value of said Debentures and upon the par of said stock for such year, and *any surplus net earnings arising in such year which may then remain shall be paid to and distributed among the holders of Class B Debentures pro rata.*"[1]

It is undisputed that the amount required annually for the preferential payment to holders of defendant's stock and Class A Debentures aggregated $155,000 (i.e., $125,000 for the stock and $30,000 for the Class A Debentures). In each of the years 1924 to 1943 inclusive, excepting 1932-1934, defendant, after paying this $155,000, had additional net earnings which aggregated $1,643,618.85. In those years, out of such additional net earnings, defendant paid to the

[1] Emphasis added.

Class B Debentures only $840,000, leaving an unpaid balance of $809,618.85. The figures, in detail for each of those years, are not at all in doubt; they appear in exhibits B and C at-
[fol. 64] tached to plaintiffs' complaint which I set forth in a footnote.[2]

I see no basis for any suggestion that the directors are given any discretion in fixing the amount to be paid. The instrument expressly provides that it is to be computed by

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2 Exhibit "B" attached to complaint:

Year	Net Earnings (after deducting reserves for additions, general improvements and depreciation)	Paid on Capital Stock	Paid on Class A Debentures	Net Earnings payable on Class B Debentures
1924	$ 197,883.57	$ 125,000.00	$ 30,000.00	$ 42,883.57
1925	194,964.16	125,000.00	30,000.00	39,964.16
1926	192,795.67	125,000.00	30,000.00	37,795.67
1927	219,592.97	125,000.00	30,000.00	64,592.97
1928	229,278.75	125,000.00	30,000.00	74,278.75
1929	235,211.65	125,000.00	30,000.00	80,211.65
1930	245,491.57	125,000.00	30,000.00	90,491.57
1931	180,482.28	125,000.00	30,000.00	25,482.28
1935	171,161.66	125,000.00	30,000.00	16,161.66
1936	242,763.66	125,000.00	30,000.00	87,763.66
1937	308,110.51	125,000.00	30,000.00	153,110.51
1938	173,017.64	125,000.00	30,000.00	18,017.64
1939	243,505.48	125,000.00	30,000.00	88,505.48
1940	253,497.69	125,000.00	30,000.00	98,497.69
1941	301,165.54	125,000.00	30,000.00	146,165.54
1942	304,250.05	125,000.00	30,000.00	149,250.05
1943	591,446.00	125,000.00	30,000.00	436,446.00
Totals	$4,284,618.85	$2,125,000.00	$510,000.00	$1,649,618.85

Exhibit "C" attached to complaint:

Year	Net Earnings payable on Class B Debentures	Amounts Actually Paid on Class B Debentures	Net Earnings Withheld
1924	$ 42,883.57	$ 35,000.00	$ 7,883.57
1925	39,964.16	35,000.00	4,964.16
1926	37,795.67	35,000.00	2,795.67
1927	64,592.97	35,000.00	29,592.97
1928	74,278.75	70,000.00	4,278.75
1929	80,211.65	70,000.00	10,211.65
1930	90,491.57	70,000.00	20,491.57
1931	25,482.28		25,482.28
1935	16,161.66		16,161.66
1936	87,763.66	70,000.00	17,763.66
1937	153,110.51	105,000.00	48,110.51
1938	18,017.64		18,017.64
1939	88,505.48	35,000.00	53,505.48
1940	98,497.69	35,000.00	63,497.69
1941	146,165.54	70,000.00	76,165.54
1942	149,250.05	70,000.00	79,250.05
1943	436,446.00	105,000.00	331,446.00
Totals	$1,649,618.85	$840,000.00	$809,618.85

deducting from the net income the amount paid on the capital stock and the amount paid on the Class A Debentures. The resulting sum is to be paid to the Class B Debenture-holders. Nor are the directors given any discretion as to whether or not that sum is to be paid to the Class B Debenture-holders. The instrument declares that "the *amount payable will be* fixed and *declared* by the Board of Directors." Under such a provision, a resolution by the directors would be purely ministerial. Cf. *Crocker* v. *Waltham Watch Co.*, 300 Mass. 397, 53 N. E. (2d) 230; *Wood* v. *Larry*, [fol. 65] 47 Hun 550 (app. dismissed 124 N. Y. 83); *Burke* v. *Ottawa Gas & Electric Co.*, 87 Kans. 6. The obligation of defendant to make payment of the amounts withheld is therefore, I think, complete without any resolution.

My colleagues, however, make this suggestion: Plaintiffs are here suing for monies alleged by them to have been improperly withheld in the years 1924 to 1943 inclusive; since this suit was not brought until 1944, the plaintiffs have "by long acquiescence" accepted as correct an interpretation of the debenture provision which precludes payments not expressly declared by the directors to be due, i.e., makes a directors' resolution an indispensable condition precedent. Since here there is not (and my colleagues do not even intimate that there is) such delay as to bar the suit because of the statute of limitations or laches, my colleagues' suggestion comes to this: One who does not promptly sue on a written instrument must be presumed to have acquiesced in [fol. 66] an interpretation of it unfavorable to him. I know of no authorities to sustain that position, and my colleagues cite none.

2. It follows, I think, that the doctrine of *forum non conveniens* has no proper application here.[3] For, in the circumstances, decision will involve no interference with the corporation's internal affairs. We said in *Cohen* v. *American Window Glass Co.*, 126 F. (2d) 111, 113 (C. C. A. 2) that the ruling in *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 183, had been much weakened; and the facts here surely

[3] See Dainow, *The Inappropriate Forum*, 29 Ill. L. Rev. 867 (1935); Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Col. L. Rev. 1 (1929); Foster, *Place of Trial in Civil Actions*, 43 Harv. L. Rev. 1217 (1930); 44 Harv. L. Rev. 41 (1930).

are far less strong than in the *Rogers* case,[4] for here the contractual duty of the defendant depends solely on a mathematical computation easily made.

Accordingly, the case boils down to one in which the need for examination of Wisconsin "law" is the only ground for sending the action to Wisconsin for trial. In other words, my colleagues are saying, in effect, that whenever a question of conflict of laws arises, a trial court has discretion to reject jurisdiction. I think that such rejection constitutes abuse of discretion. Especially is that true here where the plaintiff is a resident of New York; five of the defendant's six directors have their place of business in New York (at least two residing there and two in the adjoining state of New Jersey); two of the three members of the defendant's Executive Committee (which is authorized to do all acts that the Board of Directors may do during intervals between directors' meetings) have their place of business in [fol. 67] New York; and defendant's vice-president, its secretary-treasurer and its assistant secretary-treasurer have their offices in New York.

It seems to me that the doctrine applied here by my colleagues might well be called "*forum inconveniens.*"

3. There remains this argument, aside from the doctrine of *forum non conveniens:* The directors have failed to act, and, as they are not parties to the suit, the court cannot compel them to act. I cannot agree that that argument is apposite here. As already noted, on the facts, since the directors lack all discretion, their action would be purely ministerial. In such circumstances, their presence in court and a court order directing them to act would be the sheerest formalities. Certainly in a court of equity such action by the directors should not be a condition precedent to the corporation's liability. For equity considers that done which ought to be done and disregards formalities. These maxims have been frequently applied in a variety of cir-

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[4] Or the *Cohen* case which was stronger than the *Rogers* case. The *Cohen* case, as we there stated, involved almost the most "complete interference with the internal affairs of a foreign corporation" imaginable.

cumstances when dispensing with mere ministerial acts.[5] And even in actions "at law," conditions precedent of that character are disregarded on grounds of fairness.[6]

[fol. 68] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, Suing on Behalf of Themselves and All Other Holders of Class B Debentures of Green Bay and Western Railroad Company, Plaintiffs-Appellants,

against

GREEN BAY AND WESTERN RAILROAD COMPANY, Defendant-Appellee

PETITION FOR REHEARING

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Second Circuit:

Your petitioners, Bertram Williams, Max Brasch and Heinz Mottek, suing on behalf of themselves and all other holders of Class B Debentures of Green Bay and Western Railroad Company, respectfully petition this Court to grant a rehearing on the merits of its decision affirming (by a divided Court) the order of the District Court for the Southern District of New York which dismissed the complaint without prejudice to the commencement of an action in Wisconsin, on the ground that the subject matter of the action involved interference with the internal affairs of a

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[5] See, e.g., *Theater Realty Co.* v. *Aronberg-Fried Co.*, 85 F. (2d) 383, 387 (C. C. A. 8); *In re Greenberg*, 271 Fed. 258, 259 (C. C. A. 2); *Mutual Life Ins. Co.* v. *Corodemos*, 7 Fed. Supp. 349, 351; *White* v. *White*, 194 N. Y. Supp. 114, 117; *Farley* v. *U. S.*, 291 Fed. 238, 241; 30 C. J. S. §§ 106 and 107.

[6] Williston, *Contracts* (Rev. ed. 1938) § 806 (pp. 2262-2263); cf. § 615 (pp. 2312-2313); *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F. (2d) 978, 990-991 (C. C. A. 2); *Restatement of Contracts*, § 265; *Adamson* v. *Alexander Milburn Co.*, 275 Fed. 148 (C. C. A. 2); *Friede* v. *White Co.*, 244 Fed. 272, 274; 17 C. J. S. § 1009.

foreign corporation (*forum non conveniens*). The ground upon which rehearing is sought is as follows:

[fol. 69] The majority of the Court based their decision on the holding, seemingly erroneous, that the defendant's directors were available for the service of process in Wisconsin where, in the opinion of Judge Hutcheson it is stated, "both corporation and directors can be sued".

Corporate action by the directors is required herein according to the holding of the majority of the Court. It seems manifest error to invoke the doctrine of *forum non conveniens* to make it impossible for a plaintiff to sue in the only district in which he can obtain jurisdiction over the alleged necessary parties, i. e., both the corporation and the directors.

The undisputed facts in this record indicate that the directors cannot be reached with process in Wisconsin but are amenable to process only in New York, where five of the defendant's six directors reside or have their places of business and where directors' meetings are regularly and customarily held. Joinder of the directors as parties can be effected only in New York.

Wherefore, your petitioners respectfully pray this Court to grant a rehearing to the end that it may redress what, it is respectfully submitted, is error committed by it.

Bertram Williams, Max Brasch and Heinz Mottek,
By Unger & Pollack, Milton Pollack, A Member
of the Firm, Attorneys and Counsel.

Milton Pollack, Ludwig Mandel, Of Counsel.
Dated: New York, February 19, 1945.

[fol. 70] Certificate of Counsel

I, Milton Pollack, a member of the firm of Unger & Pollack, counsel for petitioners, do hereby certify that in my judgment the foregoing petition for rehearing is well founded in law and in fact and that the same is not interposed for the purpose of delay.

Milton Pollack.

[fol. 71] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, Suing on Behalf of Themselves and All Other Holders of Class B Debentures of Green Bay and Western Railroad Company, Plaintiffs-Appellants,

against

GREEN BAY AND WESTERN RAILROAD COMPANY, Defendant-Appellee

Before Chase, Hutcheson and Frank, Circuit Judges

Unger & Pollack, for Petitioner; Milton Pollack and Ludwig Mandel, of Counsel.

Per Curiam:

Petition for rehearing denied.

H. B. C., J. C. H., Jr., C. J. J.

Filed March 5, 1945.

[fol. 72] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of March one thousand nine hundred and forty-five.

Present: Hon. Harrie B. Chase, Hon. Joseph C. Hutcheson, Jr., Hon. Jerome N. Frank, Circuit Judges.

BERTRAM WILLIAMS, etc., et al., Plaintiffs-Appellants,

v.

GREEN BAY AND WESTERN RAILROAD COMPANY, Defendant-Appellee

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

Alexander M. Bell, Clerk.

[fol. 73] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Bertram Williams, etc., et al., Plain-

tiffs-Appellants, v. Green Bay and Western Railroad Company, Defendant-Appellee. Order. United States Circuit Court of Appeals, Second Circuit. Filed March 5th, 1945. Alexander M. Bell, Clerk.

[fol. 74] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of March one thousand nine hundred and forty-five.

Present: Hon. Harrie B. Chase, Hon. Joseph C. Hutcheson, Jr., Hon. Jerome N. Frank, Circuit Judges.

BERTRAM WILLIAMS, etc., et al., Plaintiffs-Appellants,

v.

GREEN BAY AND WESTERN RAILROAD COMPANY, Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 75] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Bertram Williams, etc., et al., Plaintiffs-Appellants, v. Green Bay and Western Railroad Company, Defendant-Appellee. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed March 6, 1945. Alexander M. Bell, Clerk.

[fol. 76] Clerk's Certificate to foregoing transcript omitted in printing.

ORDER ALLOWING CERTIORARI—Filed October 8, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson and Mr. Justice Burton took no part in the consideration or decision of this application.

Endorsed on Cover: Enter Milton Pollack. File No. 49,788. U. S. Circuit Court of Appeals, Second Circuit. Term No. 100. Bertram Williams, Max Brasch and Heinz Mottek, suing on behalf of themselves and all other holders of Class B Debentures of Green Bay and Western Railroad Company, Petitioners, vs. Green Bay and Western Railroad Company. Petition for a writ of certiorari and exhibit thereto. Filed May 31, 1945. Term No. 100, O. T. 1945.